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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

GARY AVANT GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. WHETHER A SEARCH CAN BE JUSTIFIED AS LAWFUL ON THE BASIS OF CONSENT WHEN THAT "CONSENT" HAS BEEN GIVEN ONLY AFTER THE OFFICIAL CONDUCTING THE SEARCH HAS ASSERTED THAT HE MAY OBTAIN A SEARCH WARRANT AND TEAR DOWN A DWELLING, AND HAS MADE OTHER THREATS.

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Petitioner, Gary Avant Green, [hereafter Green], presently on appeal bond pending final judgment of a sentence of five years for possession and conspiracy to possess, petitions for a writ of certiorari to review the affirmance of his conviction and sentence by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirming Green's conviction and sen-

tence is reported at *United States v. Green*, 678 F.2d 81 (8th Cir. 1982). A copy of the opinion is included in the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on May 24, 1982. Mr. Justice Blackmun granted an extension of time to file a petition for writ of certiorari to and including August 18, 1982. The Court's jurisdiction is invoked under 28 U.S.C. §1254 with Green asserting here, and having asserted below, a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Green was convicted of possession of a controlled substance, intention to deliver a controlled substance, and conspiracy with intention to deliver a controlled substance in violation of 21 U.S.C. §§841, 846. After a jury trial he was sentenced to five years imprisonment with an additional special parole term of three years. The indictment

charging these offenses alleged that the transactions occurred between September 1, 1980, and October 7, 1980.

On October 7, 1980, Jorge Alvarez was staying in Green's farmhouse in Mayflower, Faulkner County, Arkansas. The farmhouse was under surveillance by law enforcement authorities for the State of Arkansas, the local counties, and the Federal Drug Enforcement Administration. After an undercover agent had purchased a quantity of cocaine from Alvarez a decision was made to arrest Alvarez and search the house.

Sometime between 4:00 a.m. and 5:30 a.m. [R. 110, Motion], several law enforcement officers — under the direction of D.E.A. Agent Michael Hurley — entered Green's farmhouse and arrested Alvarez. The officers did not have an arrest warrant or a search warrant to enter the home. Hurley commented that he did not think it was necessary to obtain the warrant.

While Alvarez was under arrest he was asked about certain items that the officers were seeking. He did not tell them where these items were nor did he consent to any kind of search. Alvarez was threatened with deportation, having his girl friend arrested, and having a search warrant obtained and the house torn apart before he finally gave consent just prior to being taken to police headquarters. As a result of the search cocaine was discovered behind a bathroom wall, money and a gun were seized from beneath a mattress, and cocaine was recovered from the vacuum cleaner bag. [R. 110, 37, 19, Motion].

Green filed a timely motion to suppress the evidence obtained as a result of this illegal search. He claimed standing because of a legitimate expectation of privacy in his

farmhouse and further claimed that Alvarez had not given a free and voluntary consent to search the house. Green claimed that Alvarez' consent was obtained as a result of (1) the government representing it could obtain a search warrant and tear down the house; (2) threats against Alvarez' girl friend; (3) promises of leniency for Alvarez' cooperation; (4) Alvarez having used cocaine at the time consent was given.

The trial court denied Green's motion to suppress. After the verdict Green appealed his conviction. During the pendency of the appeal information was brought to Green by one of the witnesses for the United States indicating that the witness had lied. Further, an undercover agent that had been present at the farmhouse came forward and stated that the search had not been the result of a voluntary consent. The trial court heard this additional evidence and denied a motion for new trial.

The rulings of the trial court were affirmed by the United States Court of Appeals. The ruling of the Court of Appeals indicated that the trial court's findings of fact should not be disturbed on appeal.

Green seeks review by this Court to answer the questions presented — i.e., can consent obtained as a result of the subtle and overt pressures outlined above be deemed voluntary for purposes of the Fourth Amendment? Green seeks a writ of certiorari from this Court to review the decision of the United States Court of Appeals for the Eighth Circuit.

REASON FOR GRANTING THE WRIT

WHEN A LAW ENFORCEMENT OFFICER CLAIMS THAT HE CAN OBTAIN A SEARCH WARRANT AND TEAR A HOUSE DOWN HE ANNOUNCES IN EFFECT THAT THE OCCUPANT HAS NO RIGHT TO RESIST THE SEARCH AND ANY CONSENT GRANTED UNDER SUCH A SITUATION IS COERCED.

The Fourth Amendment guarantees that people will be secure from unreasonable searches and seizures. If a search is conducted without a warrant having been issued by an independent magistrate upon a showing of probable cause it is considered to be *per se* unreasonable. The reasonableness of the governmental intrusion can be established if the government can show that the search falls under a clearly delineated exception to the warrant requirement.

One of these recognized exceptions is that the search was conducted pursuant to a valid consent to search. *Vale v. Louisiana*, 399 U.S. 20 (1970). If the consent is not freely and voluntarily granted, then any search conducted pursuant to that consent is unreasonable and the fruits of that search must be suppressed. *Schneckcloth v. Bustamonte*, 412 U.S. 218 (1973). The key is to look to the totality of the circumstances and determine if the government has met its burden of showing a valid consent to search.

The issue squarely presented in this case is whether a representation by the government that if consent is not given then a warrant will be obtained and the house torn apart renders the subsequent consent involuntary. Green contends that this type of coercion is improper and the resulting consent invalid. *United States v. Watson*, 423 U.S.

411, 424 (1976); *Bumper v. North Carolina*, 391 U.S. 543 (1968).

In *Bumper v. North Carolina, supra*, the Court held that consent granted after an assertion by the government that it had a warrant that did not exist was nonconsensual, and the fruits of the resultant search were suppressed. 391 U.S. at 803. This case carries the issue one step further and invites the Court to determine if a search based in part upon governmental assertions of what *can* be done if consent is not forthcoming renders the consent involuntary.

In this case several factors were relied upon in getting the "consent." First, and foremost, was the threat that if the consent were not forthcoming a warrant would be obtained and a house torn apart. (It is doubtful that a warrant to tear a house apart could be obtained except upon a most unusual showing of probable cause). Also, the threat of possible deportation was suggested. A threat was made as to penalties that could be imposed if consent were not given and the full sanctions of the law were applied against the defendant. A threat was made as to the safety of the defendant's girl friend. All of this pressure was brought to bear upon a man 1000 miles from home, surrounded by armed law enforcement agents, unfree to leave, and "free basing," cocaine.

The Court has recognized that threats, promises, and subtle forms of coercion can be present to "flaw," the judgment of a person giving consent. *United States v. Watson*, 423 U.S. at 424. Indeed, various courts around the country have dealt with what constitutes "subtle," coercion in different ways.

Holding a person incommunicado for a period of time is sufficient to invalidate an otherwise apparently valid

consent to search. *United States v. Rothman*, 492 F.2d 1260 (9th Cir. 1973). Fear of loss of public assistance (not unlike fear of more severe criminal penalties), is sufficient to invalidate an otherwise apparently valid consent. *Reyes v. Edmund*, 472 F. Supp. 1218 (D.C. Minn. 1979). Duress created in part by the inability to leave is sufficient to overcome an apparent consent to search. *United States v. Nembhard*, 512 F. Supp. 15 (D.C. Minn. 1980). Being told that a search warrant can be obtained can render invalid a "voluntary," consent. *United States v. Molt*, 589 F.2d 1247 (3rd Cir. 1978). Even the threat to tear a house apart pursuant to warrant if consent is not forthcoming is sufficient to invalidate an otherwise valid consent. *United States v. Kampbell*, 574 F.2d 962 (8th Cir. 1978).

This Court has stated that the Fourth Amendment requires that

> . . . consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting "consent," would be no more than a pretext for unjustified police intrusion against which the Fourth Amendment is directed. *Schneckcloth v. Bustamonte*, 412 U.S. at 228.

This case provides the Court the opportunity to breathe life back into this constitutional guarantee as opposed to permitting a steady erosion of the right to remain free from such governmental intrusion. See *United States v. Green*, 678 F.2d 81 (8th Cir. 1982); *United States v. Stephenson*, 542 F.2d 1094 (9th Cir. 1976); *United States v. Culp*, 472 F. 2d 459 (8th Cir. 1973).

The Court should grant certiorari and set this matter for argument. Upon review the decision of the United States Court of Appeals for the Eighth Circuit should be reversed, the cause remanded to the trial court with instructions to grant the motion to suppress, and all evidence seized as a result of this illegal search should be excluded. *Wong Sun v. United States*, 371 U.S. 471 (1963).

CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted, the decision of that court reversed on the issue set out above, and the cause remanded to the District Court with instructions to enter an order suppressing the fruits of the illegal search upon retrial. This Court should set this matter for oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas M. Carpenter, a member of the Bar of this Court, and counsel for petitioner herein, do hereby certify that a true and correct copy of the foregoing petition and the accompanying appendix have been served on all opposing counsel this 18th day of August, 1982, by mailing, first class postage prepaid, copies of same to the Honorable Don Curdie, Assistant United States Attorney, United States Courthouse and Post Office, Little Rock, Arkansas 72203, and to the Honorable Wade Hampton McCree, Jr., Solicitor General of the United States, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

/s/ Thomas M. Carpenter
Counsel for Petitioner